89-751

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DALE R. WILEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 1989

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

I

QUESTION PRESENTED

A creditor having assumed the position that its claim is not for fraud and having succeeded in maintaining that position, and thereby having avoided the bar of limitation, may not thereafter assume a contrary position in a subsequent proceeding to determine the dischargeability of the judgment debt.

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DALE R. WILEY,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Dale R. Wiley respectfully requests that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed a judgment of the United States District Court for the Southern District of Texas determining that a judgment debt owed by Petitioner to Respondent was not dischargeable under 11 U.S.C. § 523(a)(2)(A).

THE OPINION BELOW

The opinion of the Court of Appeals is not reported and is reproduced as an Appendix to this petition at page A-1. The judgment of the Court of Appeals is reproduced as an Appendix to this petition at page B-1.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 29, 1989. Petitioner's petition for rehearing was denied without opinion on September 26, 1989. The denial is reproduced as an Appendix to this petition at page C-1.

Petitioner invokes the Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). Filing of this petition was accomplished within ninety (90) days after the Court of Appeals' opinion and judgment, and was therefore timely under 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of this Court.

STATUTORY PROVISION INVOLVED

Title 11, United States Code, section 523(a), provides in relevant part as follows:

> "(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud. . . ."

STATEMENT OF THE CASE

Petitioner Dale R. Wiley was an investor who joined one of two joint ventures set up to operate cotton farms in Gaines County, Texas, during the crop year 1973. Wiley received a payment of $53,653.50 under the 1973 Upland Cotton Program on July 5, 1973. The Agricultural Stabilization and Conservation Service ("ASCS") of the Department of Agriculture determined that Wiley had participated in a scheme which tended to defeat the purposes of the program and ordered repayment of the $53,653.50. On July 3, 1979, the United States filed suit against Wiley and a number of his fellow investors in the Northern District of Texas to recover the payments made under the 1973 Upland Cotton Program. Wiley and his fellow defendants, taking the position that the claim of the United States was essentially a claim for fraud, interposed the defense of limitation under 28 U.S.C. § 2415(b) which applies to actions brought by the United States which are grounded in tort. The government insisted that its action did not sound in fraud but was merely for the enforcement of an administrative determination of participation in a scheme to defeat the purposes of the Upland Cotton Program. The district court held that the applicable statute of limitations was 15 U.S.C. § 714b(c), but that the government's cause of action accrued (and the statute began to run) when the payments were applied for, rather than when they were made. The district court also held that the regulations under which the government demanded refund were unconstitutionally vague. The United States appealed and the case against Wiley and his fellow investors was consolidated with a number of similar cases under the style *United States v. Batson,* in which the opinion of

the Court of Appeals for the Fifth Circuit is reported at 706 F.2d 657 (1983). The court of appeals, noting that the government had not sued for fraud, *Id.* at 674 (n. 24) and 677, affirmed the district court in holding that 15 U.S.C. § 714b(c) was the applicable statute of limitation but held that the government's cause of action accrued at the time of payment, not the time of application, reversed the district court on the issue of unconstitutional vagueness, and instructed the district court to accord administrative finality to the factual determinations of the ASCS on remand.

The district court overruled a number of due process defenses and granted summary judgment for repayment of the subsidy payments as determined by the ASCS with interest from the date of final ASCS determinations. Both the government and the defendants appealed and, the cases again being consolidated on appeal, the Court of Appeals for the Fifth Circuit affirmed the denial of the due process defenses and reversed the award of interest, holding that interest should be awarded from the date of subsidy payments. *United States v. Batson*, 782 F.2d 1307 (1986). On remand, the district court entered judgment against Wiley for the amount of the subsidy payment $53,653.50, with interest at six percent per annum from the date of payment, July 5, 1973.

Wiley and his wife filed their joint voluntary petition for relief under Chapter 7 of Title 11, United States Code, in the Bankruptcy Court for the Southern District of Texas. The United States filed a complaint to determine the dischargeability of the judgment debt in its favor, and both parties moved for summary judgment. The district judge withdrew the reference from the bankruptcy judge and, after a hearing, granted the government's

motion for summary judgment. Wiley appealed and the Court of Appeals for the Fifth Circuit affirmed the judgment of the district court.

Wiley urged in both the district court and the court of appeals that the government, having "rather strenuously insisted that its action against the participants of the scheme did not sound in fraud, because the statute of limitations for fraud had already lapsed," (App. A-4) is precluded or estopped from assuming a contrary position in the proceeding to determine the dischargeability of the judgment debt.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals for the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of this Court. The Court of Appeals did not follow the applicable decision of this Court with respect to preclusion or judicial estoppel against inconsistent positions.

Certiorari also should be granted because the Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The Court of Appeals has held the defense of preclusion not to be available in dischargeability cases under *Brown v. Felsen*, 442 U.S. 127 (1979).

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Davis v. Wakelee, 156 U.S. 680, 689 (1895); citing and relying on *Railroad Co. v. Howard,* 13 How. 307, *Railroad Co. v. McCarthy,* 96 U.S. 258, *Brooklyn City & N.R. Co. v. National Bank of the Republic,* 102 U.S. 14, and numerous other cases. While this Court does not appear to have had many occasions to revisit the doctrine enunciated in *Davis v. Wakelee,* its holding seems to be alive and well in the lower federal courts; see *Roth v. McAllister Bros., Inc.,* 316 F.2d 143 (2d Cir. 1963); *Scarano v. Central R. Co. of N.J.,* 203 F.2d 510 (3d Cir. 1953); *Hughes v. Ward Oil Corp.,* 124 F.2d 393 (5th Cir. 1941, reh. den. 1942); *Texas Co. v. Gulf Refining Co.,* 26 F.2d 394 (5th Cir. 1927) *cert. den.* 278 U.S. 625 (1928); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F.Supp. 1146 (D.S.C. 1974); and *In re Galerie des Monnaies of Geneva, Ltd.,* 55 B.R. 253 (Bkcy. S.D.N.Y. 1985). The doctrine of preclusion or judicial estoppel against inconsistent positions is also expounded in the encyclopedias; see 46 AM. JUR. 2d *Judgments,* § 398, p. 567; 50 C.J.S. *Judgments,* § 727, p. 215; 1B, *Moore, Federal Practice,* ¶ 0.405[8], 765-768 (2d ed. 1971); *cf. Restatement (Second) of Judgments,* § 27e, p. 257 (1982).

This case presents the clearest possible opportunity for the application of the doctrine. Had the government candidly stated its position in the trial court in its suit against Wiley and his fellow investors, there would be no judgment for the government to contend to be non-dischargeable. But for the government's strong position that its claim did not sound in fraud, its action would have been barred by limitation. The government should not be allowed to "have its cake and eat it too." *Duplan Corp. v. Deering Milliken, Inc., supra* at 1177. That is

the very evil which the doctrine of preclusion against inconsistent positions is designed to prevent.

The Court of Appeals, in the Wiley case, failed to apply the doctrine of preclusion or estoppel against inconsistent positions, and then, confusing it with the related but distinct doctrine of *res judicata,* held it inapplicable in dischargeability cases under *Brown v. Felsen, supra.* This Court did not specifically address preclusion or estoppel against inconsistent positions in *Brown v. Felsen,* however, the opinion in *Brown v. Felsen* expressly stated that it concerned "res judicata only, and not the narrower principle of collateral estoppel. Whereas res judicata forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit. [Citations omitted.]" *Id.* at 139, n. 10.

The Court of Appeals thus decided the questions of preclusion against inconsistent positions and the applicability of preclusion in dischargeability cases in a way in conflict with applicable decisions of this Court and also raised a question under *Brown v. Felsen* (which has become one of the most important, if not the most important, precedents in the law of dischargeability) which has not been, but should be, settled by this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner, Dale R. Wiley, respectfully suggests that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari have been served upon:

The Solicitor General
Department of Justice
Washington, D.C. 20530

and upon:

The Hon. Henry K. Oncken
United States Attorney
Ms. Kimberly A. Pignuolo
Assistant United States Attorney
P. O. Box 61129
Houston, Texas 77208

in accordance with Rule 28 of the Rules of the Supreme Court, the same having been mailed, first class, postage prepaid, on the _____ day of November, 1989.

G. ERNEST CALDWELL

APPENDIX A

IN THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2017

IN RE: UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DALE R. WILEY,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(H-88-3038)

(August 29, 1989)

Before GEE, REAVLEY and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:*

The issue in this appeal is whether the debt owed to the United States by this debtor in bankruptcy is nondischargeable under 11 U.S.C. § 523(a)(2)(A). The district court granted the United States' motion for summary judgment. We affirm.

The unnderlying debt in this case arose from an elaborate scheme to bilk the United States out of cotton

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

subsidies in the 1970s. The existence of the scheme and the liability of its participants to refund their ill-gotten gains to the United States has already been thoroughly litigated, and the facts are set forth in *United States v. Batson (Batson I)*, 706 F.2d 657, 659-71 (5th Cir. 1983), and *United States v. Batson (Batson II)*, 782 F.2d 1307, 1309-10 (5th Cir.), *cert. denied*, 477 U.S. 906, 106 S. Ct. 3277, 91 L.Ed.2d 567 (1986). To summarize briefly: Cotton subsidies in the 1970s were being distributed according to a formula that included the productivity of the land. A group of individuals in Gaines County Texas, took a small tract of land, approximately two-thirds of an acre, and used enough water, fertilizer, and tender loving care to boost the productivity of the tract to about five times the productivity of the ordinary land in Gaines County. The individuals then sought cotton allotments based on that artificially inflated productivity. Once the allotments were procured, the individuals set about buying up, recombining, subdividing, and transferring land in Gaines County so that thousands and thousands of acres became subject to the fraudulent allotment of that one small tract. To evade the $55,000 cap on payments of cotton subsidies, the participants in the scheme then subdivided the land into separate plots that would each receive approximately the $55,000 limit in cotton subsidies. These plots were then leased to investors who joined one of two joint ventures set up for the purpose of operating the groups of farms. Each of the investors would receive the inflated cotton subsidy and then remit approximately 80 percent of the subsidy to the principals of the scheme. Dale Wiley was one of these investors. Eventually the Agricultural Stabilization and Conservation Service (ASCS) shut down the operation and ordered refunds from all of the participants of the scheme. Mr.

Wiley was ordered to repay the government $53,653.50. After the refund order was reduced to judgment and the appeals were exhausted, Dale Wiley and his wife Loree Wiley filed a joint petition for relief under Chapter 7 of the Bankruptcy Code. The United States filed a complaint to determine the dischargeability of the debt owed, and both parties moved for summary judgment. The district court withdrew the reference from the bankruptcy court and, after a hearing, granted the government's motion for summary judgment.

11 U.S.C. § 523(a)(2)(A) provides that a debt for money obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition" is not dischargeable under Chapter 7. To preclude the discharge of a debt because of a debtor's false representation, a creditor must prove: (1) that the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) that the creditor relied on such representation; (3) that his reliance was reasonably founded; and (4) that the creditor sustained a loss as a result of the representation. *Schweig v. Hunter (In Re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986). Wiley claims that any claim by the government based on fraudulent misrepresentation is precluded by res judicata. Under 7 C.F.R. § 722.817 (1973), the ASCS could have ordered a refund of the overpaid cotton subsidies upon a finding that the recipient had knowingly adopted any scheme or device which tends to defeat the purpose of the program, that the recipient had made any fraudulent representation, or that the recipient had misrepresented any fact that would make him not entitled to payments. The ASCS founded its order of refund against Wiley and the other

investors only on a finding that they had participated in a scheme which tended to defeat the purposes of the program. In *Batson I*, we specifically held that "this is not an action for fraud. . . . This is not merely a matter of nomenclature. The government's cause of action in each case is expressly pleaded as one to enforce the *administrative* determination that the refunds are due." 706 F.2d at 677. And, in fact, the government rather strenously insisted that its action against the participants of the scheme did not sound in fraud, because the statute of limitations for fraud had already lapsed. *See, e.g., id.* (quoting the government's brief, "At no time has the United States alleged or attempted to prove fraud."). Wiley argues that because the government could have and chose not to bring an action against him for fraud, the government's fraud claim merges into the claim upon which it received judgment, and the government is now barred from asserting any fraudulent misrepresentation. *See Restatement (Second) of Judgments* § 18 (1982).

The appellant's argument is without merit. The United States is not attempting to relitigate its claim against Wiley but is merely attempting to meet the new defense of bankruptcy which the appellant has asserted against the United States in an action by the United States to *collect* the sum already determined to be due it. *See Brown v. Felsen*, 442 U.S. 127, 133, 99 S. Ct. 2205, 2210, 60 L.Ed.2d 767 (1979). It is now well settled that res judicata does not bar a creditor from asserting that a debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A), even though the debt is based upon a judgment for a claim other than fraud. *See id.* at 138-39, 99 S. Ct. at 2213; *Frank v. Daley (In Re Daley)*, 776 F.2d 834, 837-38 (9th Cir. 1985), *cert. denied*, 476 U.S. 1159, 106 S. Ct. 2279, 90 L.Ed.2d 721 (1986).

The district court did not issue any reasons for its judgment for the United States, but the government's cousel asserts that the United States was entitled to summary judgment under the doctrine of collateral estoppel. The rule in *Brown v. Felsen*, applies only to the doctrine of res judicata, and the Supreme Court specifically noted that "the narrower principle of collateral estoppel" may still apply in proceedings to determine the dischargeability of a debt. 442 U.S. at 139 n.10, 99 S. Ct. at 2213 n.10. The doctrine of collateral estoppel precludes relitigation of any issue of law or fact which is actually litigated and determined by a valid and final judgment and the determination of which is essential to the judgment. *Restatement (Second) of Judgments* § 27 (1982); *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5, 58 L.Ed.2d 552 (1979). The government claims that the determination of the ASCS upon which its judgment against Wiley is based established nondischargeability of the debt as a matter of law. The most patent flaw in the government's argument is that, as observed above, the ASCS based its order of refund on a finding that Wiley had participated in a scheme which tended to defeat the purposes of the program, not a finding that Wiley had made fraudulent misrepresentations. Moreover, even if the ASCS had determined that Wiley owed a refund on the basis of fraudulent misrepresentations as defined in the regulation, it is doubtful that a bankruptcy court could simply accept that administrative determination as a substitute for its own determination of nondischargeability under § 523. *See In Re Daley*, 776 F.2d at 838.

Collateral estoppel does apply in a determination of dischargeability to subsidiary facts actually litigated and

necessarily decided in the action for the underlying debt. *Harold v. Simpson & Co. v. Shuler (In Re Shuler)*, 722 F.2d 1253, 1256 (5th Cir.), *cert. denied*, 469 U.S. 817, 105 S. Ct. 85, 83 L.Ed.2d 32 (1984). The government contends that subsidiary facts were found by the ASCS which, taken together, establish all the elements of non-dischargeability. Collateral estoppel, however, does not apply to these factual findings because a finding that Wiley made false representations, that the goverment relied on those representations, and that the government's reliance was reasonable were not necessary to a finding that Wiley knowingly participated in a scheme which tended to defeat the purposes of the program. The government attempts to remedy any deficiency in its claim for collateral estoppel by arguing that findings of the ASCS are required by statute to be given a collateral estoppel effect. Under 7 U.S.C. § 1385, factual findings "constituting the basis for . . . any payment under the . . . upland cotton . . . programs . . . when officially determined in conformity with the applicable regulations prescribed by the Secretary or by the Commodity Credit Corporation, shall be final and conclusive and shall not be reviewable by any other officer or agency of the Government." Section 1385 does not make ASCS findings final and conclusive for all purposes, but only for program payment purposes. As we noted in *Batson II*, § 1358 "does not, however, accord finality to the administrative determination as a whole." 782 F.2d at 1311. The requirement that courts treat ASCS findings as final and conclusive in program payments disputes does not suggest that those findings should be given collateral estoppel effect in all cases and for all purposes and without regard to the requirements of the doctrine of collateral estoppel. On

the contrary, unreviewability of factual findings has traditionally been held to be grounds for refusing to apply the doctrine of collateral estoppel. *See Restatement (Second) of Judgments* § 28(1) (1982). The basis of the district court's judgment for the government in this case, therefore, could not have been collateral estoppel.

The government also claims that summary judgment was justified on the basis of the evidence in the summary judgment record. The record before the district court contained only three documents, copies of the administrative findings by the ASCS at the county, state, and national levels. It is undisputed that these public records indicating administrative findings were proper evidence upon which summary judgment could be based. *See* Bankr. R. 7056; Fed. R. Civ. P. 56(c), (e); Fed. R. Evid. 902(4), 803(8)(c). Appellate review of a grant of summary judgment rests upon the same standards that applied in the district court. *Medlin v. Palmer*, 874 F.2d 1085, 1089 (5th Cir. 1989). Therefore, the question on appeal is whether the uncontroverted administrative findings establish that there is no genuine issue as to any material fact on each of the elements of the government's nondischargeability claim. We are cognizant of the fact that the record and any inferences therefrom must be viewed in a light most favorable to the nonmovant, Wiley. *Id.* We further note that the government's burden of establishing nondischargeability by clear and convincing evidence, *In Re Hunter*, 780 F.2d at 1579, must be taken into account in determining the sufficiency of the summary judgment record. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55, 106 S. Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

At the county level, the ASCS found that forty-two persons, including Dale Wiley, "claiming to be producers, acting as persons eligible for program payments, made claims and received payments under the program." The county ASCS official found that all forty-two producers were wrongfully overpaid. The ASCS found that Wiley and the other "producers" made claims for undeserved cotton subsidies either directly or through A. Earl Jones, who was specifically appointed "as their agent with power of attorney to 'handle routine transactions such as signing up for ASCS programs' at the ASCS office in the Gaines County Courthouse" at Seminole, Texas. The lease agreements entered into by Wiley and others and filed with the ASCS represented that the "producers" were substantively in farm operations and that the leases were bona fide and not made for the purpose of evading the payment limitation; but the ASCS specifically found that the "lease agreements were fabricated for the sole purpose of establishing eligibility of each of the lessees to claim program payments." The ASCS found that Wiley and others involved in the scheme "claimed to each be producers actively engaged in farming operations," but that in fact they "were not actively engaged in farming operations of the joint venture. They had no personal involvement. They were not farmers. They owned no farming equipment on Farm D-362. They did not labor and they, themselves, produced no cotton." At the national level, the ASCS adopted the county-level findings and further emphasized that each of the participants of the scheme knowingly made false statements to the ASCS, knowingly made false claims for program payments, and knowingly participated in the scheme.

Wiley now argues that the administrative findings do not constitute the sort of fraud contemplated by 11 U.S.C. § 523, because the bankruptcy law requires active fraud and more than mere failure to disclose relevant facts. *See In Re Hunter*, 780 F.2d at 1579-80. Wiley claims that he and the other members of the joint venture were not in any way involved in the fraudulent manipulation of the cotton subsidy allotment and that, although he knew of the fraud, he merely accepted benefits generated by a scheme in which he took no active part. Wiley's claims, however, are clearly contrary to the evidence. The evasion of the $55,000 limit on program payments was as important a part of the scheme as the original manipulation of the cotton subsidy allotments, if not more important. Evasion of the $55,000 limitation required the active participation of Wiley and the other joint venturers by their misrepresentation of their eligibility for program payments and their filings of false claims with the ASCS. The mere fact that Wiley's misrepresentations and filings of false claims were accomplished through the actions of an agent who was specifically appointed and given a power of attorney for the purpose of making those misrepresentations does not alter the nature of Wiley's fraudulent conduct.

Under the rule in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986), once a party moving for summary judgment has properly supported the motion showing the absence of any genuine issue of material fact, the nonmoving party has the burden to go forward with evidence demonstrating the existence of a genuine issue of material fact. Wiley has not introduced any evidence into the summary judgment record to controvert the administrative findings

introduced by the government. Wiley's only argument against entry of summary judgment is that the summary judgment hearing was supposed to be only on the issues of res judicata and collateral estoppel and that the district court erred in entering a summary judgment for the government without giving Wiley notice and an opportunity to introduce controverting evidence into the record. The district court apparently did not credit Wiley's absence of notice argument, and neither do we. There was no order by the district court nor was there any agreement between the parties to limit the scope of the summary judgment hearing. The government's motion for summary judgment not only included its argument that it was entitled to summary judgment based on collateral estoppel and on the finality of the administrative findings under 7 U.S.C. § 1385, but also a separate argument that it was entitled to summary judgment on the basis of the record, that "there is ample, conclusive evidence that the four [elements of nondischargeability] have been satisfied as proven by the administrative determinations attached hereto as exhibits 'A' through 'C' which are re-urged in support of this argument." In response to the government's motion for summary judgment, Wiley not only answered the legal argument that the administrative findings were entitled to finality but also argued that the findings themselves did not resolve all the disputed issues of material fact. The district court rejected Wiley's argument, and if Wiley did not wish to rest his defense against the motion for summary judgment solely on that argument, then he should have introduced controverting evidence, if he had any.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2017

D.C. Docket No. H-88-3038

IN RE:

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DALE R. WILEY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before GEE, REAVLEY, and JOLLY, Circuit Judges.

JUDGMENT

This cause came on be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 29, 1989

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2017

IN RE:

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DALE R. WILEY,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(September 26, 1989)

Before GEE, REAVLEY and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ NORMAN M. REAVLEY
United States Circuit Judge